

26.1 General Discussion

Under Public Law 105-178 (TEA-21), a 10 percent National goal was established for the participation of Disadvantaged Business Enterprises (DBEs) in transportation contracting, in an effort to ensure equal opportunity in transportation contracting and address the effects of past and current discrimination. Requirements of the DBE Program, as prescribed in 49 CFR Part 26, apply to all recipients (and subrecipients) of highway, transit, and airport funds.

A local agency, when participating in programs funded in whole or in part with funds made available by the Washington State Department of Transportation (WSDOT), must either adopt WSDOT's DBE Plan, or develop an equivalent plan. The local agency equivalent plan must have the approval of WSDOT's Office of Equal Opportunity and the Federal Highway Administration (FHWA).

While WSDOT's Office of Equal Opportunity (OEO) has the overall responsibility for administration and implementation of WSDOT's DBE Program, local agencies (as subrecipients) also have an important role to ensure that their Federally-assisted contracts are administered in accordance with the State's approved DBE Program Plan, which is available on WSDOT's website.

WSDOT's OEO, in coordination with the Operations Engineer for Highways and Local Programs, will conduct compliance reviews of the local agency's administration of the DBE Plan. A local agency that is found to be in noncompliance may be subject to formal enforcement action (suspense or loss of Federal funds and/or CA status). A finding of noncompliance will result for failure to comply with the requirements of WSDOT's DBE Plan.

Each Federally-assisted contract/subcontract must include the following assurance:

The contractor, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of USDOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

26.2 Procedures

- a. **Local Agency DBE Liaison Officer.** The local agency is responsible for ensuring program compliance and monitoring its contractor's DBE activities. To accomplish this, a DBE liaison officer must be appointed by the local agency. This liaison officer must be an administrator responsible to the chief executive of the agency. This administrator should have the authority to delegate the responsibility

to the people who perform the contractor compliance function. The liaison officer's duties are to ensure compliance with the DBE Plan by the local agency and by their contractors.

- b. **DBE Firm(s) Certification.** The Washington State Office of Minority and Women's Business Enterprise (OMWBE) is the sole authority in the State of Washington to perform certification of all minority business enterprises, women business enterprises, and socially and disadvantaged business enterprises for programs administered by any State, local, or Federal agency. This statutory authorization extends to and binds all USDOT DBE Program recipients in the State of Washington. Only DBE firms that are currently certified by OMWBE may be used by prospective bidders on Federally funded projects. A directory of certified DBE firms is maintained and published by OMWBE. A copy of the directory is available via WSDOT's web page or directly from OMWBE. Their address is:

Office of Minority and Women Business Enterprise
406 South Water
Olympia, WA 98504
Telephone: (360) 753-9693

- c. **Establishment of Project DBE Goals.** The Highways and Local Programs Operations Engineer will review each project to determine if it involves work elements that are conducive to DBE participation. To initiate this review, the local agency must submit an engineer's estimate with their suggested DBE goal to the Regional Local Programs Engineer when the contract work is determined. The estimate must show the item quantities and costs of the project.

If a local agency has any other projects tied to a federally funded project which utilizes one set of bid documents, the total project is considered a federal aid project for DBE goal setting purposes.

The goals for federal aid projects will be set under one of the following categories based on the projected participation level during the year to achieve the overall goal:

- Voluntary Goal
- Mandatory Goal
- Zero Goal

The Highways and Local Programs Operations Engineer will then establish a voluntary or mandatory DBE goal for the project. The methodology employed by WSDOT and its Highways and Local Programs Service Center in determining state and local agency project contract goals is as follows:

A. Elements

1. Geographical location of the project;
2. Type(s) of work included in the project, i.e., structure, roadway, new construction;
3. Availability of DBEs to perform the type(s) of work;
4. Potential subcontractable items of the work; and
5. Total dollar value of the contract.

The attainment accomplished through this analysis will be reviewed annually to determine the appropriateness of the method of setting goals.

B. Goal Setting Process

1. Review the department's overall DBE goal and the means to meet the goal (Refer to WSDOT's DBE Plan: XVIII, Overall DBE Goals and XXIII, Means to Meet the Overall DBE Goal);
2. If the contract includes federal funds, a DBE goal is considered;
3. If the contract amount is under \$100,000.00 then no goal is set. (However, if the work is such that the prime contractor has a distinctly separate class of work available, and meets the requirement for the prime to do 30% of the work, a goal may be considered);
4. The bid items are sorted by pre-qualification work classes and the total estimated dollar amounts to help identify opportunities for subcontracting;
5. Prime contractor work is assumed to be one class (the largest) unless two classes are needed to total a minimum of 30% of the total contract;
6. Mobilization nor specialty work is considered for subcontracting;
7. The remaining work is totaled, both as a percentage and a dollar amount. It is then divided by two (2). (50 percent of the total identified subcontractable items would be available for DBE firms, while the other 50 percent would be available for non-DBE firms); and
8. Ensure that DBE firms are ready, willing, and able to perform the work at the geographic location and time of the project.

If a local agency feels the project goal set by the Highways and Local Programs Operations Engineer is inappropriate, they may submit a request to have it changed. This request must be accompanied by justification based on the above criteria for establishing the contract goal.

d. **DBE Provisions in the Plans, Specifications, and Estimate (PS&E).**

After the goal has been determined, the applicable WSDOT General Special Provision (GSP), for the type of goal set as outlined above shall be included in the PS&E. These GSPs are available on the WSDOT website or from the Regional Local Programs Engineer. Only the WSDOT GSPs are approved for use on an FHWA funded project.

To complete the DBE requirements in the PS&E, when a mandatory goal is established, Form 272-056A, "Disadvantaged Business Enterprise Utilization Certification," will be included. This form shall be in the proposal given to each bidder. This form is available from the Regional Local Programs Engineer. When a voluntary or zero goal is established the DBE utilization form is not required.

- e. **Bid Opening.** Each bid proposal must be reviewed to determine if the bid is responsive. For a contract with goals, each proposal shall contain the form "Disadvantaged Business Enterprise Utilization Certification" completed by the contractor.

Failure to complete this form will be considered as evidence that the proposal is unresponsive and, therefore, is not eligible for award.

- f. **Is the DBE Firm Certified by OMWBE?** The DBE firm named by the contractor in the bid proposal shall be certified as a DBE firm by OMWBE to be eligible for work on an FHWA funded project. (See b, above.) To verify whether a firm is certified as a DBE and eligible to perform work on an FHWA funded project, you must call OMWBE at (360)753-9693. To meet the goals for the project, DBE firms not certified at the time fixed for the bid opening will not be accepted by the local agency for participation, as a Condition of Award (COA) Contractor, in the project.

g. **Selection of the Successful Bidder**

A. Selection of Successful Bidder (When a mandatory goal is established.)

1. The successful bidder shall be selected on the basis of having submitted the lowest responsive bid and, in order to be responsive, making good faith efforts to meet the DBE goal. The bidder can meet this requirement in either two ways:
 - a. The bidder can meet the established DBE goal, documenting commitments for participation by DBE firms sufficient for this purpose; or
 - b. If the bidder does not meet the established DBE goal, the bidder can document its adequate good faith efforts.

This means that the bidder must show that it took all necessary and reasonable steps to achieve the DBE goal, and by their scope, intensity, and appropriateness to the objective, the bidder could reasonably be expected to obtain sufficient DBE participation, even if the bidder were not fully successful in meeting the established DBE goal. Mere pro forma efforts are not considered “good faith efforts” to meet the DBE contract requirements.

2. Should the low and otherwise responsive bidder fail to attain the goal and provide adequate good faith effort documentation in the bid submittal, its bid may be rejected and the next low responsive bid accepted.
3. Should more than one low bid be rejected, WSDOT and its subrecipients will determine the adequacy of the low and otherwise responsive bidder’s submission in light of DBE participation attained by all bidders. This will be accomplished by comparing the low bidder’s submission to the average DBE participation by all bidders. When computing average DBE participation, only the amount of the DBE goal attainment which does not exceed the established goal shall be used. Should the low bidder’s DBE participation be lower than the average, the bid shall be considered nonresponsive and shall be rejected. If the lowest bid is rejected, the next lowest bid(s) shall be examined under the foregoing criteria until the contract is awarded or all bids are rejected. The following is an example of goal averaging.

	Example 1		Example 2	
	Total Bid	DBE Bid	Total Bid	DBE Bid
Low Bid	\$ 99,000	13%	\$ 99,000	15%
Second	100,000	16%	100,000	13%
Third	100,500	15%	100,500	16%
Fourth	101,000	16%	101,000	16%
Total of DBE Bids		60%		60%
Average DBE Bid Goals		15%		15%

Each bidder shall submit a written assurance with their bid that they will meet the goal. The successful responsive bidder must provide the following information at the time of bid submittal:

1. The names of the DBE subcontractors proposed for contracts, including the OMWBE certification number.
2. The dollar value of each DBE subcontract proposed.

The successful bidder will obtain verification of OMWBE certification from the DBE business firm. The certification will identify the firm as being eligible

for DBE status. The successful bidder will have the responsibility of verification with OMWBE that the DBE firm’s certification is current.

B. After Execution

WSDOT will request that the apparent low bidder submit a description of the specific items of the work each DBE subcontractor will perform. This description, dollar amount, and name of the DBE firm is identified in the award letter and made Condition of the Award (COA) of the contract.

In the event a bidder is unable to meet the assigned DBE contract goal, the bidder shall provide additional information regarding its good faith efforts to do so per the requirements of the contract. Good Faith Effort (GFE) documentation may be required after award and during the execution of the contract. GFE documentation may also be required during substitutions when a firm is unable or unwilling to perform. The bidder must document the steps taken to obtain participation which demonstrate *good faith efforts*, as outlined:

1. Evidence the bidders attended any presolicitation or prebid meetings that were scheduled by WSDOT to inform DBEs of contracting and subcontracting or material supply opportunities available on the project;
2. Evidence the bidder identified and selected specific economically feasible units of the project to be performed by DBEs in order to increase the likelihood of participation by DBEs;
3. Evidence the bidder advertised in general circulation, trade association minority and trade oriented, women-focus publications, concerning the subcontracting or supply opportunities;
4. Evidence the bidder provided written notice to a reasonable number of specific DBEs, identified from the OMWBE Directory of Certified Firms for the selected subcontracting of material supply work, in sufficient time to allow the enterprises to participate effectively;
5. Evidence the bidder followed up initial solicitations of interest by contacting the DBEs to determine with certainty whether they were interested. This may include the information outlined:
 - a. The names, addresses, and telephone numbers of DBEs who were contacted, the dates of initial contact, and whether initial solicitations of interest were followed up by contacting the DBEs to determine with certainty whether the DBEs were interested;

- b. A description of the information provided to the DBEs regarding the plans, specifications, and estimated quantities for portions of the work to be performed;
 - c. Documentation of each DBE contacted but rejected and the reason(s) for that rejection;
6. Evidence that the bidder provided interested DBEs with adequate information about the plans, specifications, and requirements for the selected subcontracting or material supply work;
 7. Evidence the bidder negotiated in good faith with the DBE firms, and did not without justifiable reason reject as unsatisfactory bids prepared by any DBE;
 8. Evidence the bidder advised and made efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance required by WSDOT or the contractor;
 9. Evidence the bidders efforts to obtain DBE participation were reasonably expected to produce a level of participation sufficient to meet the goal or requirements of WSDOT;
 10. Evidence that the bidder used the services of minority community organizations, minority contractor groups, local, state, and federal minority business assistance offices and other organizations identified by WSDOT and advocates for disadvantaged, minority, and women businesses that provide assistance in the recruitment and placement of disadvantaged, minority, and women business enterprises; and
 11. Evidence the bidder used the services of WSDOT's DBE Supportive Services consultant.

C. Administrative Reconsideration

If WSDOT or its subrecipients determine that the apparent successful bidder/offer or has failed to make a good faith effort to meet the goal, WSDOT and its subrecipients will, before awarding the contract, provide the bidder/offer or an opportunity for administrative reconsideration.

1. As part of this reconsideration, the bidder/offer or will have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so;
2. WSDOT's decision on reconsideration shall be made by an official who did not take part in the original determination that the bidder/offer or failed to meet the goal or make adequate good faith efforts to do so;

3. The bidder/offer or shall have the opportunity to meet in person with said official to discuss the issue of whether it met the goal or made good faith efforts to do so;
4. WSDOT shall send the bidder/offer or a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so; and
5. The results of the reconsideration process is not administratively appealable to the USDOT.

- h. **Condition of Award Letter.** The condition of award letter carries the same contractual obligation as the contract specifications and is only required when a mandatory goal is established for the project. A condition of award letter appears as Appendix 46.42. The second, third, fourth, and fifth paragraphs must be included in the letter. The DBE work shall be shown in the fifth paragraph. If a portion of an item is sublet to a DBE and the remainder is done by the contractor or another subcontractor, the DBE's work must be shown in detail in the fourth paragraph of the letter. Also, any DBE suppliers and manufacturers shall be shown.

Send a copy of this letter and a copy of the "Disadvantaged Business Enterprise Utilization Certificate" to the Regional Local Programs Engineer as a part of the award documentation submittal explained in Chapter 46.

Attach a copy of the letter to the contract papers that you send to your contractor for signature. The Regional Local Programs Engineer shall be provided information on subletting by DBE contractors.

- i. **Between Award and Execution.** The contractor shall supply a contractors bidders list as described in the GSP's for all categories (voluntary, zero, and mandatory goals.) **The list shall include all firms that bid on prime contracts or bid or quote subcontracts (successful and unsuccessful) on USDOT-assisted projects, including both DBEs and non-DBEs.** The list shall also include the firms name and address.

- j. **Monitoring of the DBE During Construction.** The local agency must place special emphasis on the DBE requirements at the preconstruction conference. Changes to a condition of award letter shall be submitted in the form of a change order to the Regional Local Programs Engineer.

Project diary documentation of the DBE's activities on the project must be performed in the same manner as is done on the prime contractor and any other subcontractor's activities.

In addition to the project diary, the form "DBE On-Site Review" should be completed by the CA Agency for every DBE condition of award (see Appendix 46.42):

- at the start of work, and/or
- at the peak period of work, and/or
- whenever changes in the performance of the work warrants its completion.

The review should be completed per on-site observations, documentation review, and interviews of contractor's personnel. This completed form becomes a part of the local agency's project records. Additional forms are available from your Regional Local Programs Engineer.

The WSDOT GSP, Disadvantaged Business Enterprise Participation, and Chapter 1 of the WSDOT Construction Manual shall be followed to ensure compliance with the DBE Plan.

In order to satisfy the contract goal, a DBE firm shall perform a commercially useful function. A commercially useful function is defined as: responsibility for executing a distinct element of contract work and carrying out those responsibilities by actually performing, managing, and supervising the work involved. The documentation in the project diary and on the DBE On-Site Review form is the information that the local agency will use to determine whether a DBE is performing a commercially useful function. If there is evidence that a DBE firm is not performing a commercially useful function, immediately contact your Regional Local Programs Engineer.

- k. **Prompt Payment.** Refer to Amendment Section 1-08, Prosecution and Progress (March 6, 2000) and RC W 60.28 for "Prompt Payment" requirements.
- l. During **Completion of Construction.** The contractor shall submit Quarterly Report of Amounts Credited as DBE Participation, WSDOT Form 422-102 EF, to the local agency. On this form, the contractor shows the actual amount paid to the DBE firm for the contract work. This completed form is required quarterly and a final at the completion of the project must be submitted to the Olympia Service Center Highways and Local Programs Operations Engineer as specified on the form.
- m. **Records and Reports.** The local agency will maintain such records and provide such reports as necessary to ensure full compliance with the Plan.

Upon request from the OMWBE, WSDOT, or the USDOT, the local agency shall submit the records deemed necessary for inspection, auditing, and review purposes.

26.3 Consultant Agreement Goals

The Highways and Local Programs Operations Engineer will review each consultant agreement with an estimated cost over \$250,000 to determine if a DBE goal is applicable for the agreement. The goal setting process follows the same guidelines at the construction contract (see 26.2(c)) only it utilized the tasks outlined in the agreement in place of the bid items.

1. The Local Agency will as part of the advertisement, indicate the established DBE goal in their advertisement for proposals.
2. Responsiveness to the DBE goal shall not be determined prior to award. However, failure to meet goal attainment may be utilized as an evaluation criteria on past work performance.
3. The Consultant shall include in their response to a Request for Qualifications an Information Packet that identifies the potential subcontractors, both DBE certified and non-DBE firms.
4. The Consultant will submit a scope of work and cost estimate that will identify each subconsultant. The consultant will meet the project DBE goal, identifying each subconsulted element of work.
5. The monitoring of DBE participation will be tracked using the Quarterly Amounts paid DBE participants as discussed in 26.2(k).

Appendixes

- 26.41 [Quarterly Report of Amounts Credited as DBE Participation](#)
- 26.42 [Disadvantaged Business Enterprise Utilization Certification](#)

Quarterly Report of Amounts Credited as DBE Participation



Quarter (1st, 2nd, 3rd, 4th) or Final _____ of Year _____		State Contract Number _____		
		Federal Employer I.D. Number _____		
Contractor _____				
DBE Participant Name and Federal Employer I.D. Number		Contract Type	Date of Payment	*Dollar Credit Amount
<p style="text-align: center;">Contract Type: S = Subcontractor A = Agent M = Manufacturer R = Regular Dealer J = Joint Venture V = Service Provider</p>				
<p>I, the undersigned, do hereby certify that in connection with all work on the project for which this statement is submitted, each DBE participant contracted by me has been paid on the dates shown. *Further, I certify that the amounts shown under "Dollar Credit Amount" are in accordance with the "DBE Eligibility" portion of the DBE Special Provision.</p>				
Signature _____ Title _____				

DOT Form 422-102 EF
3/00

Disadvantaged Business Enterprise Utilization Certification



**Washington State
Department of Transportation**

Disadvantaged Business Enterprise Utilization Certification

To be eligible for award of this contract the bidder must fill out and submit, as part of his/her proposal, the following certification relating to Disadvantaged Business Enterprise (DBE) requirements. This certification shall be deemed a part of the resulting contract. Failure to fill out and submit this certification, the inclusion of a false certification, or insufficient projected use of DBEs, shall be considered as evidence that the proposal is non-responsive to the invitation to bid.

Information on certified firms is available from OMWBE, phone (360) 753-9693.

certifies that the following Disadvantaged Business Enterprise(s)

Name of Bidder _____

(DBE) have been contacted regarding participation on this project and, if it is the successful bidder on this project, it shall award subcontracts to or enter into supply agreements with the following DBEs as indicated: (if necessary, use additional sheet).

Name of DBE Certificate Number	Capacity * (Prime, Joint Venture, Subcontractor, Manufacturer, Regular Dealer, Service Provider)	Description of Work	Amount to be Applied ** Towards Goal
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			

Disadvantaged Business Enterprise Subcontracting Goal: _____ DBE Total \$ _____ ***

* Regular Dealer status must be approved by the Office of Equal Opportunity, Wash. State Dept. of Transportation, on each contract.

** See the section "Counting DBE Participation Toward Meeting the Goal" in the Contract Document.

*** The Contracting Agency will utilize the above data to determine whether or not the bidder has met the goal or the average goal attainment of all bidders.

DOT Form 272-056A EF
Revised 12/97